

Flatbush Manor Care Center and Fair Management Consulting Corp. and Local 1199, Drug, Hospital and Health Care Employees Union, Petitioner. Case 29-RC-7764

November 26, 1993

ORDER

The National Labor Relations Board has decided to include in the bound volumes the attached Order, which issued on August 19, 1993, and its Decision on Review and Order, which issued on March 12, 1992.

By direction of the Board: John C. Truesdale, Executive Secretary.

ORDER

August 19, 1993

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Petitioner's Motion to Consolidate this case with *Brookdale Hospital*, 26-UC-149, is denied. Petitioner's Motion for Reconsideration of the Board's Decision on Review and Order of March 12, 1992, is denied as it raises no issues not previously considered and it lacks merit. Petitioner's Request for Oral Argument is also denied.¹ The Special Appeal by S.S.I. Agency, a non-party to this proceeding, for the Board to stay the election and reverse the Regional Director is denied as moot.

MEMBER DEVANEY, dissenting.

I would grant Petitioner's Motion for Reconsideration, as well as its Request for Oral Argument.

March 12, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The Request for Review by Schoen, the Temporary Receiver of the Flatbush Manor Care Center, of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review. See, e.g., *Stanley E. Stein*, a Receiver for *Holi-*

day Inn Coliseum, 300 NLRB 631 (1990). Schoen's request to stay the election is also denied.

Fair's Request for Review is granted solely with respect to the issue of the inclusion of the LPNs provided to the Employer by agencies as it raises substantial issues warranting review. Based on the Regional Director's findings, we conclude, contrary to the Regional Director, that the Employer and the agencies referring the "pool" LPNs to the Employer, co-determine their essential terms and conditions of employment and are the joint employers of the pool LPNs working at the Employer. The agencies recruit, hire, and provide some orientation to the pool LPNs. The Employer and the agencies agree to an hourly fee for the use of the pool LPNs, but the agencies determine their LPNs' hourly wage. The agencies make social security, workers' compensation, and disability insurance deductions. Both the Employer and the agencies are involved in discipline. The Employer may counsel an unsatisfactory pool LPN and may request that the agency not send that LPN back to the Employer, but the agency determines whether the pool LPN will be sent to another facility or terminated. The Employer provides its own orientation and decides if it will accept LPNs sent by the agencies. The Employer assigns and directs employees, establishes labor relations policies applicable to pool employees, and uses its own supervisors to exercise day-to-day control over the pool LPNs. The Employer determines hours and schedules pool employees, but, at least with respect to Inter-American, the agency may not allow the pool employee to work more than 40 hours per week. In these circumstances, we find that the Employer and the referring agencies are joint employers. *W. W. Grainger, Inc.*, 286 NLRB 94 (1987), enf. denied other grounds 860 F.2d 244 (7th Cir. 1988).

Since we find the Employer and the agencies to be joint employers of the pool LPNs, these LPNs must be excluded from the unit found appropriate here. The Board does not include employees of a joint employer in the same unit with employees of a single employer, without consent of the employers. *Lee Hospital*, 300 NLRB 947, 948 (1990), citing *Greenhoot, Inc.*, 205 NLRB 250 (1973). See also *International Transfer of Florida*, 305 NLRB 150 (1991). There is no indication of such consent here. We therefore reverse the Regional Director and exclude the pool LPNs from the unit. In all other respects, Fair's Request for Review is denied.

¹ In denying Petitioner's motions, the Board also carefully considered Intervenor's letter and the amicus statements of SEIU and AFSCME in support of the Petitioner's position.